SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973

No. 73-1078

JESS L. ELROD, *et al.*,

Petitioners,

vs.

WESTERN CONFERENCE OF TEAMSTERS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. .....

JESS L. ELROD, JOHN BILANDZIJA, ERBY L. ELROD, CECIL CROW, GERALD R. HOLSTIN, ERBY R. LEWIS, MIKE A. MARTINEZ, VALENTINE E. NAYLOR and GENE L. WILSON, each individually and as a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and TEAMSTERS LOCAL 357, FREIGHT HANDLERS, CLERKS AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

WESTERN CONFERENCE OF TEAMSTERS, an unincorporated association; JOINT COUNCIL OF TEAMSTERS NO. 42, an unincorporated association; TRUCKING EMPLOYERS, INC., a corporation; CALIFORNIA TRUCKING ASSOCIATION, a California corporation; MASON MERCANTILE CO., a California corporation, doing business as METROPOLITAN TERMINALS; LOS ANGELES WHOLESALE INSTITUTE, a California corporation; PIGGY BACK SHIPPERS, a California corporation; CALIFORNIA SHIPPERS ASSOCIATION, a California corporation; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association (hereinafter INTERNATIONAL); TEAMSTERS LOCAL 357, FREIGHT HANDLERS, CLERKS AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association (hereinafter LOCAL 357); LOCAL 208, LOCAL FREIGHT DRIVERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association (hereinafter LOCAL 208); DOE I through 50, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Central District of California. Said judgment affirmed the District Court's orders granting the Union defendants' Motion to Dismiss (Fed. R. Civ. P. 12(b)) and granting the Employer defendants' Motion to Dismiss and/or For Summary Judgment (Fed. R. Civ. P. 56), each with prejudice.

OPINION BELOW

The opinion of the aforesaid Court of Appeals is attached hereto as Appendix "A".

JURISDICTION

The decision of the Court of Appeals was filed on December 6, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254;

QUESTIONS PRESENTED

I

Whether, in a suit brought pursuant to Section 301 of the Labor Management Relations Act by union members for wrongful discharge by their employers and breach of duty of fair representation by their unions, the trial court abused its discretion in granting the employers' motion for summary judgment and the unions' motion to dismiss with prejudice and denying plaintiffs leave to amend where:

A. The complaint had not previously been amended;

B. Leave to amend had not previously been requested;

C. In large part, the major concern of the trial court was that plaintiffs had failed to allege that the unions had acted "arbitrarily, discriminatorily and in bad faith" in breaching their duty of fair representation, *i.e.*, the "form," not the substance, of the allegations;

D. None of the affidavits of the plaintiff union members which stated facts showing wrongful discharge in violation of the collective bargaining agreement by the employers and breach of duty of fair representation by the unions, were denied by either the employers or the unions;

E. There were many factual issues in controversy;

F. Many issues of law were never adjudicated, *e.g.*, plaintiffs' claims against Local 208, which International President Fitzsimmons admits was the cause of the strike, lockouts, etc., in the first instance.

II

Whether, in such a suit, the trial court erred as a matter of

law in holding that the 100-day California statute of limitations for actions to vacate an arbitration award applied where:

A. The suit is one properly brought in either the state or federal courts pursuant to Section 301 of the Labor Management Relations Act under *Vaca v. Sipes,* 386 U.S. 171;

B. Plaintiffs contended that the "Special Panel," which the court held to be an arbitrator, was without jurisdiction to render a decision in that the Stipulation and Agreement among the employers and the unions setting up the Special Panel to hear the employers' charges against the employees violated the Constitution of the International in that:

   1. It amended the contractual grievance procedure without submitting it to a vote of the membership.

   2. It gave to two lawyers, the attorney for the employers and the attorney for the unions, the power to rewrite the contractual grievance procedure without submitting it to a vote of the membership.

III

Whether, in such a suit, an employer wrongfully discharged employees in violation of the collective bargaining agreement, where it is alleged by affidavit, and not denied by the employer, that the employer:

A. Locked out non-striking employees because of threats of violence and actual violence by members of another striking local to any employee who crossed the picket

line;

B. While the employees were locked out, gave said employees 24 hours to report for work;

C. Refused to guarantee the employees' safety or offer any protection from the violence of the pickets, in violation of the California Labor Code;

D. Thereafter fired the employees for failing to report to work;

E. Thereafter promised the employees that it would rehire them;

F. Thereafter refused to rehire the employees and hired scabs, to whom they offered and provided full protection to take said employees' places;

G. Thereafter placed the employees on a blacklist of men it would not rehire, solely because the employees subsequently picketed to protest their discharge.

IV

Whether, in such a case, a labor union local and its parent organizations breached their duty to fairly represent their members and acted arbitrarily, discriminatorily and in bad faith where said labor organizations:

A. Entered into an agreement with the employers, in violation of the grievance procedure in the collective bargaining agreement and the Constitution of the International, which provided that:

1. The decision of the Special Panel set up by said agreement was final and binding and that there was no appeal therefrom;

2. All grievances filed by the discharged employees against their employers would be heard by said

Special Panel (which in fact heard only the employers' charges against the employees);

3. No back pay would be awarded to any employee whose grievance against his employer for wrongful discharge was meritorious;

B. Thereafter failed and refused to procure a statement of the charges filed by the employers against the employees, although repeatedly requested to do so by said discharged employees;

C. Thereafter provided only perfunctory representation of the discharged employees by a business agent of the local, who knew nothing of the charges lodged against the employees by the employers, who undertook no discovery to ascertain specifics of the charges against said employees, who stipulated that the employees had "picketed," when, in fact, the employees did not picket in support of the strike, but only subsequent thereto, and then, picketed only as to their wrongful firing by the employer and not in support of said strike, and which business agent, among other things, advised the discharged employees to answer only the questions put to them by the Panel, to not offer any defenses, to not present any witnesses in their own behalf, etc., and where:

D. Thereafter, the Special Panel set up by said agreement, although composed of three members from the unions and three members from the employers, never deadlocked in any case but in all cases sustained the employers' position as to employees they had blacklisted as not suitable for rehire, all of which was consistent with publications by said employers in various news media

during the strike, that, among other things, they were going to get rid of certain union member employees if it cost millions of dollars to do so.

V

Whether, in such a case, the trial court erred as a matter of law in holding that where a suit is brought by union members pursuant to Section 301 of the Labor Management Relations Act against the employers for wrongful discharge and against the unions for breach of duty of fair representation, a count which alleges a conspiracy among the employers and the unions to wrongfully discharge the plaintiff union members is an unfair labor practice which is pre-empted by the National Labor Relations Board.

VI

Whether the petitions for removal were improvidently granted where all the employers involved in a labor dispute were engaged in intrastate commerce and there is no showing in the petitions for removal that the labor organizations represented employees in an industry affecting commerce.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1331(a), 28 U.S.C. § 1337, 28 U.S.C. § 1441, 29 U.S.C. § 185(a) [Section 301, Labor Management Relations Act], California Code of Civil Procedure §§ 337(1) and 339(1). Each said statute is set forth in Appendix "C" hereto.

RULES INVOLVED

The rules involved are:

Fed. R. Civ. P. 12(b), providing that every defense shall be asserted in the responsive pleading " . . . except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Fed. R. Civ. P. 56(b), providing that "A party against whom a claim, . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

STATEMENT OF THE CASE

1. Prefatory Notes

The case at bar was removed to the United States District Court by two separate petitions for removal and was assigned separate case numbers (71-916-AAH and 71-917-AAH). However, inasmuch as the case involved one complaint naming multiple defendants, the cases

were consolidated in the trial court. Accordingly, appeals were taken from the judgments and orders entered in both cases, and there were technically two separate appeals in the Ninth Circuit and two separate Clerk's Transcripts (71-2755 and 71-2846), although there is but one Reporter's Transcript. For convenience, the Clerk's Transcript in Case No. 71-2755 in the Court of Appeals (71-916-AAH in the District Court) hereinafter will be referred to as "CT-I." and the Clerk's Transcript in Case No. 71-2846 in the Court of Appeals (71-917-AAH in the District Court) hereinafter will be referred to as "CT-II." The Reporter's Transcript hereinafter will be referred to as "RT."

2. Statement of Proceedings and Jurisdiction

These were joint appeals from orders and judgments, entered on June 8, 1971, dismissing the complaint with prejudice and without leave to amend and granting summary judgment for respondents (CT-I. 406-407; CT-II. 156, 158). The case at bar originated by way of a verified complaint for injunction and damages filed by petitioners (the plaintiffs below; hereinafter referred to as plaintiffs) in the Superior Court of the State of California for the County of Los Angeles on February 25, 1971, in which plaintiffs sought injunctive relief and damages against their labor unions (respondents herein; hereinafter collectively referred to as the unions or individually by its abbreviated title, *e.g.*, Local 357, Joint Council 42, etc.) and their employers (respondents herein; hereinafter collectively referred to as the employers or individually by its abbreviated title, *e.g.*, Metropolitan, etc.) for breach of duty of

fair representation by the unions and wrongful discharge and breach of contract of employment by the employers (CT-I. 8-72; CT-II 6-71).

Both the unions and the employers filed separate petitions for removal to the United States District Court for the Central District of California (CT-I. 1-314; CT-II. 1-71).

Jurisdiction of the United States District Court was invoked under 28 U.S.C. §§ 1441 and 1446, 29 U.S.C. § 185 [Section 301 of the National Labor Relations Act], and 28 U.S.C. §§ 1331 and 1337 (CT-I. 2, 4-5; CT-II. 4).

Thereafter, the unions filed a Motion to Dismiss (CT-II. 71-75), and the employers filed a Motion to Dismiss and/or For Summary Judgment (CT-I. 314-397).

Plaintiffs filed timely opposition to all said motions (CT-II. 80-89). The trial court, after hearing oral argument, denied leave to amend and granted all said motions on May 17, 1971 (RT. 37-38). At the same time, the trial court granted plaintiffs 15 days within which to serve and file a motion for reconsideration (RT. 41). Plaintiffs filed a timely motion for reconsideration (CT-II. 91-150). The latter motion was apparently denied by the trial court, *sub silentio.*

The judgments and orders of the United States District Court granting the employers' motion for summary judgment (CT-I. 406-407) and granting the unions' motion to dismiss without leave to amend (CT-II. 156, 158), entered on June 8, 1971 (CT-I. 408; CT-II. 160), constituted final appealable decisions of the District Court under 28 U.S.C. § 1291. On July 7, 1971, plaintiffs filed a timely notice of appeal from said orders and judgments under Rules 3 and 4, Fed. R. App. P.

(CT-I. 410-411; CT-II. 161-162) to the United States Court of Appeals for the Ninth Circuit (28 U.S.C. § 1291).

3. Statement of the Relevant Facts

(Note: The Circuit Court states, "Appellants had the opportunity to present affidavits contradicting those filed by the employers and adopted by the union. They presented no affidavits that in any material respect conflicted with the affidavits of the employers." [Appendix p. 3.] In any words, this just simply is not so. Petitioners point out the following at this point to direct the Court's attention to the fact that this is not so. In addition, there are numerous references hereinafter to matters contained in petitioners' affidavits which were never denied, contradicted, etc.)

Petitioners initially filed a complaint and fifteen declarations in support of their initial efforts in the California state court to obtain an injunction. These declarations deal in great detail with what took place prior to the strike, during the strike and thereafter. (CT-II. 24-57.) Many of the petitioners made additional affidavits in the District Court in support of their petition for reconsideration (CT-II. 104-123). Again, petitioners' affidavits specify in detail what their employer did, what the employer told them to do and not to do at the outset of the strike, during the strike and afterwards, and particularly the promises of Mr. Lincoln of defendant Metropolitan. No defendant–including, but not limited to, Mr. Lincoln of defendant Metropolitan–affirms or denies what petitioners' allege. Defendants simply do not discuss the facts of the strike, what went on before and during the course of the strike,

the hearings before the Special Panel, etc. For example, many of the petitioners admit that after the strike was underway, and *after they were fired* (but not before), they picketed over their wrongful discharge, but that at no time did they picket in favor of or against the issues allegedly precipitating the strike in the first instance.

Employer-defendants filed the affidavit of John Lincoln (CT-I. 73-76). Mr. Lincoln refers only to the bargaining agreements, the fact petitioners were fired (but no facts pertaining to the circumstances thereof), and the fact that a Special Panel later sustained their firing. There has never been an issue as to these matters. The issue was, and is, whether or not it was legally done, etc.

The same is true as to the affidavit of Charles A. Miller, filed by employer-defendants (CT-I. 331-333), who stated only that petitioners were not employed by certain other named defendant companies, and the affidavit of Edward McCarthy (CT-I. 335-337) which refers only to bargaining agreements and his knowledge of same.

The case at bar arose out of a so-called "wildcat" strike by certain teamster organizations, which swept the trucking industry in the Los Angeles area during the spring of 1970 (CT-II. 13).

Petitioners, who are members of Teamsters Local 357, at the time of the work stoppage were employed as dock workers by Metropolitan (CT-II. 13). Petitioners reported for work at Metropolitan and found the terminal was being picketed by certain members of Teamsters Local 208 who threatened to use, and in fact used, physical violence on any man who crossed the picket line (CT-II. 14-15). Both

said union locals were, and are, under the jurisdiction of Joint Council of Teamsters No. 42.

As described by Frank E. Fitzsimmons (then General Vice President, now President of the International) in the notice imposing a trusteeship on Local 208 (CT-II. 54-56, at 55):

> "The work stoppage lasted for approximately ten weeks and was characterized by widespread violence—employees were shot at, terminals were burned, trucks were damaged. *Most significantly, the members, stewards, and certain officers of Local 208 engaged in a concerted program of intimidating and coercing the members of other Local Unions of Joint Council 42, parties to the National Master Freight Agreement, to force them to remain away from the job either by actual use of, or by threat of, physical force.*" (Emphasis supplied.)

According to petitioners' verified complaint and the declarations under penalty of perjury attached thereto filed in the California Superior Court (which, under California law, are the equivalent of sworn affidavits [see, California Code of Civil Procedure § 2015.5]), which were not contradicted by any affidavits filed by the employers or the unions, petitioners were told by various members of the management of Metropolitan, including John Lincoln, the President of Metropolitan (CT-I. 73), to go home and paint their fences or mow their lawns, that the terminal was locked up since it was unsafe for the employees to report to work (CT-I. 28-57). The doors of the Metropolitan Terminal were in fact locked and armed guards hired by Metropolitan

prevented anyone, including employees of Metropolitan, from entering on Metropolitan's premises (CT-I. 54-57).

The same day petitioners were locked out of Metropolitan they were told by Lincoln to report for work within 24 hours or they would be fired (CT-I. 29-30). At the same time, Miller, the terminal manager of Metropolitan, refused to guarantee the safety or offer any protection whatsoever to any employee who crossed the picket line [in violation of California Labor Code §§ 6400, *et seq.*] (although, later, "scabs" employed by Metropolitan were given full protection) (CT-I. 45, 50). The employees who attempted to report for work after the notice was given were locked out by the management of Metropolitan (CT-I. 54-57), in violation of Article 45, Section 1 of the Collective Bargaining Agreement (CR-I. 122). Thereafter, all of Metropolitan's employees, including petitioners, were fired by Metropolitan and new employees were hired by Metropolitan to take their places (CT-I. 29-57).

Although Lincoln had been assuring the employees all along that they would all be rehired when conditions became normal, both he and Miller appeared on TV and stated that they would not consider rehiring any of their former employees, that they would prefer to close down the dock completely first (CT-I. 35). Although Lincoln filed an affidavit in support of the employers' motion for summary judgment, he did not refute or deny any of the statements contained in petitioners' verified complaint or their declarations (CT-I. 73-76).

None of the petitioners picketed Metropolitan until *after they were fired*, and then only to protest their wrongful discharge (CT-I. 29-57).

The California Trucking Association later issued a statement that although the strike had cost them millions of dollars, it was worth it to get rid of about 500 hard-core troublemakers (CT-I. 41).

Thereafter, a "Stipulation and Agreement" was entered into between the employers and the Teamsters hierarchy which set up a so-called "Special Panel" to decide which of the discharged employees would be rehired by the employers (CT-II. 18-21). The Special Panel, which bypassed the contractual grievance procedure in violation of the Constitution of the Teamsters International and gave two lawyers the power to rewrite the entire contractual grievance procedure–also in violation of the Constitution, was ostensibly set up to hear the employees' grievances against the employers, but, in fact, heard only the employers' charges against the employees.

The employers had a "blacklist" of former employees whom they would not rehire under any circumstances. The Special Panel in all cases sustained the position of the employers (see, "Notice" signed by Frank E. Fitzsimmons, CT-II. 55-57, at 55; Affidavit of Jess Elrod, CT-II. 104-105; Affidavit of Alexander B. Maheras, CT-II. 120-123).

The procedure before the Special Panel as depicted in the declarations and exhibits attached to petitioners' complaint (CT-II. 23-69) and in the affidavits and exhibits attached to petitioners' motion for reconsideration (CT-II. 104-139) was as follows:

1. The employee received a telegram to report to the Edgewater Hyatt House in Long Beach at a specified time for a hearing before the Panel (CT-II. 26).

2. Prior to the time of the hearing, the employee received no notice of the nature or specifics of the charges leveled against him by the employers (Affidavit of Maheras, CT-II. 120-123, at 122).

3. Each employee was represented by the same Business Agent of Local 357, who provided only perfunctory representation, knew nothing of the charges lodged against the employee, undertook no discovery to ascertain the specifics of charges, stipulated that each employee had "picketed," when, in fact, the employee did not picket in support of the strike but only subsequent thereto and, then, only as to his wrongful firing by the employer and not in support of said strike, and which Business Agent, among other things, advised the discharged employee to answer only the questions put to him by the Panel, to not offer any defenses, to not present any witnesses in the employee's behalf, etc. (CT-II. 24-52, 104-139).

4. The Special Panel, which consisted of three members appointed by the International and three members appointed by the California Trucking Association (CT-II. 19), never deadlocked in the case of an employee (unless he was also charged with a criminal offense), and the employer's position was always sustained (CT-II. 55, 123).

5. The decision of the Special Panel was final and binding and there was no appeal therefrom (CT-II. 19).

Petitioners' complaint contained three causes of action (hereinafter, in accordance with federal practice, referred to as counts).

Count I alleged a claim against the employers for wrongful discharge (CT-I. 11-17).

Count II alleged a claim against the unions and the employers for conspiracy among the unions and the employers to wrongfully discharge petitioners (CT-I. 17-18).

Count III alleged a claim against the unions for breach of duty of fair representation (CT-I. 19-20).

The trial court, in ruling on the unions' and employers' motions, held:

1. Count I was barred by the statute of limitations as set forth in Section 1288 of the California Code of Civil Procedure. (See Supplement to Clerk's Transcript in Case No. 71-2755: Employers' Findings of Fact and Conclusions of Law, designated as part of the record on appeal, erroneously omitted by the Clerk in preparing the record on appeal.)

2. The court lacked jurisdiction over the subject matter of Count II, in that exclusive jurisdiction is in the National Labor Relations Board (CT-II. 155).

3. Count III failed to state a claim upon which relief could be granted, in that there was no allegation of arbitrary, discriminatory or bad faith conduct on the part of the unions (CT-II. 155).

4. Count III was barred by the statute of limitations [California Code of Civil Procedure § 1288] (CT-II. 155-156).

SUMMARY OF ARGUMENT

A summary statement of the various claims petitioners made and/or could make, which petitioners feel the lower courts disregarded, is as follows:

(1) That the defendant-employer Metropolitan told them to go home and stay until the strike was resolved and, in the process, locked the premises so petitioners could not work in any event. (Petitioners' said allegations are uncontroverted.) That to and including said time, petitioners did not strike, picket, etc. That, thereafter, when petitioners received notice from Metropolitan that they were fired, petitioner then picketed, but solely on the issue of their wrongful firing and never, at any time, on the issues which precipitated and were the crux of the complaints of strikers in the first instance.

(2) That petitioners' union, Local 357, did not at any time, or in any manner, adequately represent them, or represent them at all. In particular this is true as to the strike at its inception and during the time of the alleged Panel hearing. Further, the unions stipulated away all of petitioners' rights to begin with; *e.g.*, the stipulation agreeing to the Panel hearing expressly states that even if a man was wrongfully terminated and was ordered reinstated, he could not, and would not, get back pay, there would be no right to appeal, etc.

(3) None of the employers, unions, or anyone at all, at any time, ever heard or ruled on petitioners' claims against Local 208. Petitioners have set forth in this brief the scathing indictment of Local 208 by the President of the International Teamsters organization, Fitzsimmons, at the time

he placed Local 208 in trusteeship (29 U.S.C.A. 462, *et seq.*), wherein he more than substantiates all the claims made by petitioners, as well as others, against Local 208. [See page 13, *supra.*] (Fitzsimmons' allegations are uncontroverted.) Local 208's actions in the strike were not even a tangential subject so far as the alleged Panel hearings were concerned and have never at any time or in any manner been ruled upon. (The Panel heard only employers' claims against the employees, not the employees' claims against the employers or against the unions.) Yet, by some process unknown to petitioners, it is held that petitioners cannot bring any claim(s) whatsoever against Local 208 because–again by some unknown procedure–they have been ruled upon adversely to petitioners, petitioners cannot bring them in the first instance, etc. If, in fact, the unions and employers were guilt-free and justified in firing petitioners, but Local 208 did what petitioners and Fitzsimmons have alleged, and was in fact the cause of petitioners being fired, petitioners fail to see how or where they are precluded from asserting their claims as to Local 208 for such things as assault and battery, intentional infliction of emotional distress, intentional interference with contractual relations, etc., *et al.*

ARGUMENT

I

The Trial Court Abused Its Discretion In Granting The Employers' Motion For Summary Judgment And The Unions' Motion To Dismiss And Denying Petitioners Leave To Amend.

Petitioners contend that the trial court abused its discretion in granting the employers' motion for summary judgment and the unions' motion to dismiss with prejudice and denying petitioners leave to amend where the complaint (which was originally filed in the California state court) had not previously been amended nor had leave to amend previously been requested.

As appears from the Reporter's Transcript of the hearing on the above motions, the trial court's major concern was that petitioners had failed to allege that the unions had acted "arbitrarily, discriminatorily and in bad faith" in breaching their duty of fair representation (RT. 5-37). In other words, the trial court was more concerned over the "form" than the substance of the allegations set forth in petitioners' verified complaint and affidavits attached thereto, which allegations were not denied by either the employers or the unions.

As appears from the Statement of the Relevant Facts, pages 11 - 17, *supra*, there were abundant facts set forth in the verified complaint and the affidavits attached thereto showing that the unions acted "arbitrarily, discriminatorily and in bad faith," although it is true that petitioners never used the magic words with which the trial court seemed unduly preoccupied.

Furthermore, as appears from petitioners' written motion for reconsideration (CT-II. 91-150), petitioners could have corrected the defects in pleading, if any there were in the first place.

It is submitted that the trial court abused its discretion in denying petitioners leave to amend in the circumstances of the case at bar.

A. The stipulation and agreement setting up the Special Panel violated the Constitution of the International Brotherhood of Teamsters, and, therefore, the Special Panel was without jurisdiction and its decisions were nullities.

The unions and the employers in their briefs below (Unions' Br. 9; Employers' Br. 17) contended that the record is devoid of any evidence that the stipulation and agreement violated the Constitution of the International Brotherhood of Teamsters. This is not true. Page 97, lines 9 to 17, and page 169 (entry for 6/1/71) of the Clerk's Transcript in Case No. 71-2846, clearly show that a copy of the Constitution was lodged with the trial court and that the petitioners, in their petition for reconsideration, referred to the sections of the Constitution which the stipulation and agreement violated (Article XII, § 1(b) and Article XVI, § 4(b) which incorporates § 4(a)). For the Court's convenience, petitioners attach hereto as Appendix "B" the applicable articles.

It was petitioners' contention below, and is now, that the stipulation and agreement effected such a radical change in the grievance procedure that it amounted to an entirely new contract which had to be submitted to a vote of the membership under the aforesaid provisions of the Constitution. For example, the parties to the stipulation gave up employees' right to appeal, thus denying them procedural due process without their consent; gave up the employees' right to be reinstated with back pay; and, most importantly, the stipulation and agreement gave to two lawyers, Messrs. Fastiff and Brundage, the power to amend or alter the agreement at will. Mr. Brundage apparently "represented" all

of the Locals (*e.g.*, Local 208, which the International placed in "trusteeship" for causing the strike) with their conflicting interests, as well as the parent organizations, which were aligned with the employers. It is immaterial, if it be true, as the unions and the employers stated in their briefs to the Ninth Circuit Court of Appeals, that the power was never exercised. The power existed, and there is no evidence in the record that it was not exercised. (It was exercised to the extent, at least, that the two lawyers chose the "Impartial Arbitrator" [CT-II. 19].)

The employers argued that they "could legitimately rely on the Union-Appellees' apparent authority to execute such an agreement on behalf of their constituents" (Employers' Br. 19). However, Article XVI, § 4(b), set forth in Appendix "B" hereto, provides that "[a]ll employers negotiating contracts . . . shall be provided with a copy of this Article . . . so they will have notice of the approval necessary for a binding contract" (Appendix p. 7). There is no showing that this provision of the Constitution was also violated.

B. Petitioners did not waive their right to object to the illegality of the Special Panel by appearing before it, inasmuch as their appearance before the Special Panel was involuntary and without their consent.

Both the unions and the employers contended that petitioners waived any objection to the constitution of the Special Panel by "voluntarily" appearing before it. None of the petitioners or other discharged union members voluntarily appeared before the "Special Panel," but were summoned to

appear by a telegram which apparently gave them very short notice. All attempted to file and process their grievances according to the collective bargaining agreement, but they were frustrated in their attempts either by union officials telling them that they would file grievances for them or by the Special Panel usurping the functions of the regularly constituted grievance machinery and assuming jurisdiction over the grievances which had been regularly filed. There is no evidence whatsoever that the Panel heard the employees' respective grievances against the employers. The Panel heard only employers' grievances against employees.

The "voluntariness" of petitioners' attendance at the Special Panel is best shown by the fact that they were told by their union representatives that they had to be there or they would lose by default (CT-II. 40).

II

The Trial Court Erred As A Matter Of Law In Holding That The California Statute of Limitations For Actions To Vacate An Arbitration Award Applied.

The trial court based its ruling on this point on *Howerton v. J. Christenson Company*, 65 CCH Lab. Case para 11, 569 (1971), in which the United States District Court for the Northern District of California held by way of dicta that the 100-day limitation period for setting aside arbitration awards is applicable to a suit brought under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185(a); referred to below as Section 301).

It is submitted that the trial court's reliance on *How-*

erton was misplaced and its ruling erroneous.

In the first place, petitioners contended below, and now contend (see hereinbelow) that the Special Panel set up by the stipulation and agreement entered into by the employers and the unions was without jurisdiction to hear employers' charges against the employees, in that it bypassed and amended the contractual grievance procedure without submitting it to a vote of the union membership as required by the Constitution of the International. (CT-II. 105; Constitution, Article XII, § 1(b), Article XIV, § 4(b).) Therefore, its decision, or so-called "award," was a nullity and subject to attack for want of jurisdiction without regard to the statute of limitations to vacate arbitration awards.

In the second place, a Section 301 suit against an employer for breach of collective bargaining agreement and against a union for breach of duty of fair representation, while governed by the state statute of limitations, is governed respectively by the statute of limitations for breach of contract in writing and tort claims. *De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO* (1st Cir. 1970), 425 F.2d 281.

Both the employers and the unions relied on *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), to support their contention that petitioners' complaint is barred by the statute of limitations (Employers' Br. 11-13; Unions' Br. 17-18). Both pointedly omit reference to footnote 9 of the Court's opinion, which states:

> "9. Other questions would be raised if this case presented a state law characterization

> of a § 301 suit that reasonably described the nature of the cause of action, but required application of an unusually short or long limitation period. See, *e.g.*, N.M. Stat., 1953, § 59-3-4 (an action for wages 'must be commenced within sixty [60] days from the date of discharge * * * ')."

The Court there suggests that a 60-day statute of limitations period would be unreasonable and not consistent with national labor policy which provides for a minimum of six months within which to bring an unfair labor practice proceeding. In *International Union v. Hoosier Cardinal Corp., supra,* 383 U.S. 696, the Court chose the *six-year* limitation period over a *twenty-year* limitation period and held that the *six-year* limitation period comports with the policy that favors the relatively rapid disposition of labor disputes. It should be noted that the 100-day limitation period suggested by the employers and the unions is much shorter than 180 days which the Court suggests would be the minimum reasonable limitation period.

It is submitted that the next reasonable statute of limitations for Section 301 is the four-year statute for an action upon a contract in writing (California Code of Civil Procedure § 337(1)), or, as the case may be, the two-year statute for an action upon a contract not founded upon an instrument in writing (Code of Civil Procedure § 339(1)), as to the employers, and the two-year limitation period for miscellaneous tort actions, as to the unions (Code of Civil Procedure § 339(1)).

III

The Employers Wrongfully Discharged Petitioners.

The facts of this case as set forth in the Statement of the Relevant Facts, pages 11 - 17, *supra*, make it abundantly clear that the employers wrongfully discharged petitioners, in violation of the collective bargaining agreement, and that the trial court erred in holding, "It is a free country. They can do it if they want." (RT. 13.)

IV

The Unions Breached Their Duty To Fairly Represent Petitioners In The Matter Of Their Grievances For Wrongful Discharge By The Employers.

The facts as set forth in the Statement of the Relevant Facts, *supra*, show that the unions breached their duty to fairly represent petitioners and acted "arbitrarily, discriminatorily and in bad faith," and that the trial court erred in holding to the contrary. See, *Local 13, Int. Longshoremen's & W.U. v. Pacific Mar. Ass'n.* (9th Cir. 1971), 441 F.2d 1061.

Both the unions and the employers vainly attempted to distinguish *Local 13, Int. Longshoremen's Union v. Pacific Mar. Ass'n., supra.* The unions paraphrased incorrectly the court's opinion, by stating that "the Court was able to conclude from the evidence before it . . . " (Unions' Br. 16). This is what the court stated (at p. 1066):

> "Keeping in mind that when materials lodged with the court permit a choice of 'inferences''the inferences to be drawn from

> the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.' [Citation.] We think a trier of fact might have inferred from the evidence that officials of the International union, motivated in part by hostility toward Velasquez, sacrificed his interests in order to gain a favorable result in another dispute with the employers' association. . . . "

Needless to say, there is a world of difference between "to conclude from the evidence before it" and "might have inferred" from "conflicting evidence." The court further stated (at p. 1069):

> "Recognizing that the materials before the district court would support an inference that if a 'swap' occurred it was a good-faith choice between interpretation of two provisions of the contract, the evidence we have cited is also susceptible of a different inference, namely, that the International union, actuated in part by hostility toward Velasquez, elected to sacrifice him for a favorable outcome on the 'belly-packing' issue. If a 'swap' occurred, and if the deregistration of Velasquez rather than an alternative interpretation of section 17.81 was true consideration, Local 13 would be entitled to judgment. If the duty of fair representation is to stand 'as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional powers of redress by the provisions of federal labor law' [citation], the deliberate sacrifice of a particular employee as consideration for other

objectives must be a concession the union cannot make. The issue was thus largely one of purpose.

"Where motive and intent are central issues, a covert agreement is charged, and the principal alleged participants are aligned with the opposing party, as here, summary judgment is to be granted with great caution; for 'it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.' [Citation.]

"We think this is a case in which the witnesses should be heard."

In the case at bar, there is evidence from which a trier of fact could infer that the unions traded petitioners and certain others whom the employers had branded as "hardcore troublemakers" in order that the employers would condescend to rehire without seniority and back pay certain other employees whom the employers did not consider to be troublemakers (CT-II. 33, 66, 122).

The respondent unions argued on appeal that petitioners "do not take the position here, nor did they take the position below, that the Special Panel was biased or guilty of misconduct, or that there was any prejudice to the [petitioners] from having their cases heard before the Special Panel" (Unions' Br. fn. 4, 9-10).

Petitioners wish to make it unequivocally clear that they did below, and do now, charge that the Special Panel was biased and guilty of misconduct and that they were prejudiced by having their cases heard before the Special Panel rather than the regular grievance procedure. This, at the very least, is the

import of the conspiracy count of petitioners' verified complaint, which neither the unions nor the employers have ever denied.

Moreover, petitioners contend that the uncontradicted evidence shows that the Special Panel had stacked the deck against petitioners; that the hearing before the Special Panel was a farce and a sham; that the sole purpose of the hearing was to give the rubber-stamp of legality to the employers' predetermined decision not to rehire petitioners, whom they had illegally fired and black-listed as troublemakers not suitable for rehire; that there is strong circumstantial evidence in the record from which it can be inferred that the unions and the employers, and their respective attorneys, were in collusion (*e.g.*, never deadlocking in any case). If the unions were not in collusion with the employers, it is incredible that the three representatives of the Teamster hierarchy on the Special Panel never once opposed the decision of the three representatives of the employers not to rehire petitioners and other discharged employees and never supported the position of the discharged employee over that of the employers, thus deadlocking (except in the case of an employee who was also charged with a criminal offense, in which case there was an automatic deadlock) (CT-II. 123). Furthermore, note that the employers fired "everybody," yet, some employees were taken back without ever going before the Special Panel, even though they participated in the strike, or were, at the minimum, out of the plant during the strike because they, like petitioners, were locked out, etc. (CT-II. 26).

The unions stated in their brief on appeal that petitioners' charge that "the employers' position was always sustain-

ed . . . is . . . simply incorrect" (Unions' Br. 15). On the contrary, the unions' statement is simply incorrect.

In the first place, petitioners are merely quoting the words of the esteemed General President of the International, the worthy successor of James R. Hoffa, Frank E. Fitzsimmons (CT-II 54).

In the second place, petitioners never stated that the Special Panel did not order the rehire of some employees; only that the employers' position as to the employees they had black-listed as "hardcore troublemakers" was always sustained, that none of the black-listed employees were ordered rehired by the Special Panel, and that the Special Panel never deadlocked in the case of a black-listed employee, although made up equally of representatives from the Teamsters hierarchy and the employers. In other words, the unions did not undertake at all to represent the black-listed employees but let the employers, acting as accuser, prosecutor, judge and jury, decide who was suitable for rehire. The unions conceded this, stating (Unions' Br. 3) "[e]ither at the hearing or prior thereto, the [petitioners] were advised that their employer had refused reinstatement to them . . ."

The unions characterized petitioners' contention that the Special Panel never heard their grievances but only the employers' charges against the petitioners as a "semantical argument" (Unions' Br. 14). The employers made a similar argument (Employers' Br. 22). However, Jack Crotty, the Secretary of the Teamsters' Joint State Committee, told Ernest Lunceford that there was "no way" that the Special Panel could have heard his grievance for wrongful discharge (CT-II. 107, 133-135). Thus, it appears that a high union official considered the Special Panel as merely "providing a

forum for the employers' charges against the discharged employees." It further appears from Lunceford's affidavit that when he attempted to read his grievance against his employer before the Special Panel, he was stopped by one Rohr, one of the representatives of the Teamsters' hierarchy on the Special Panel (CT-II. 107, 134).

The unions seemed to argue (Unions' Br. 15) that parties to an arbitration give up their right to appeal from its decision; otherwise, an arbitration award would be ineffective. If this be true, it would only be true where the parties have voluntarily agreed to arbitration, not where "arbitration" is forced upon one party illegally and without his consent, as it was in the case at bar.

V

The Trial Court Erred As A Matter Of Law In Holding That A Complaint Alleging A Conspiracy Among The Employers And The Unions To Wrongfully Discharge Union Members Is An Unfair Labor Practice Which Is Pre-empted By The National Labor Relations Board.

In a trilogy of cases authored by Mr. Justice White, this Court greatly expanded the concept of suits brought under Section 301 of the Labor Management Relations Act.

In the first of these cases, *Smith v. Evening News Ass'n.*, 371 U.S. 195, 83 S. Ct. 267 (1962), this Court held that an individual employee may bring suit for breach of a collective bargaining agreement against his employer in either the state or federal courts.

In the second case, *Humphrey v. Moore*, 375 U.S. 335,

84 S. Ct. 363 (1964), this Court held that jurisdiction of the state or federal courts was not destroyed if the individual employee joined his bargaining representative as a defendant, provided he could prove that his bargaining agent breached its duty of fair representation.

In *Vaca v. Sipes*, 386 U.S. 171, 84 S. Ct. 903, the third case in the trilogy, this Court reiterated its previous holding, stating (386 U.S. at 185-186):

> "For these reasons, we thing the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not

substantially changed. The action is still a § 301 suit, and the jurisdiction of the courts is not pre-empted under the *Garmon [San Diego Building Trades Council v. Garmon,* 359 U.S. 236*]* principle. This, at the very least, is the holding of *Humphrey v. Moore, supra* (375 U.S. 335 at 342), with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against the Union itself. (Footnote omitted.)

"For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight

> deterrance, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong. Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.
>
> "It follows from the above that the Missouri courts had jurisdiction in this case. (Footnote omitted.)"

The trial court, in holding that where the complaint alleged a conspiracy between the employer and the bargaining agent to wrongfully discharge an employee the matter was cognizable solely by the National Labor Relations Board, relied on two cases authored by Mr. Justice Harlan, *Local 100 of the Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423 (1963), and *Local 207 Int. Ass'n. of Bridge, etc. v. Perko*, 373 U.S. 701, 83 S. Ct. 1429 (1963).

The distinction between *Borden* and *Perko*, on the one hand and *Smith v. Evening News*, *Humphrey v. Moore*, and *Vaca v. Sipes* on the other, which the trial court failed to see, is that in *Borden* and *Perko*, the employee did not sue the employer for breach of the collective bargaining agreement

and incidentally join the union as a defendant for breach of duty of fair representation, but sued only the union for what the Court held to be an unfair labor practice cognizable solely by the NLRB. Neither of these cases held, as the trial court did, that where the complaint alleges a conspiracy between the union and the employer to wrongfully terminate an employee, the courts are pre-empted from jurisdiction over the subject matter and the charge is cognizable exclusively by the NLRB. (See, concurring and dissenting opinion by Mr. Justice Harlan in *Humphrey v. Moore*, 375 U.S. 335 at 360.)

> "Count II, containing an allegation of *conspiracy* between the company and the union to deprive plaintiff of his rights under the contract, clearly presents a valid claim. *Vaca, supra; Desrosiers, supra; Hiller, supra.* Defendant's argument, that plaintiff's allegations should have been amended to 'specifically allege resort to the contractual grievance procedures would have been futile or useless,' is without merit. The Court of Appeals, in reversing the dismissal of original Count II, did not require such an amendment; rather, it held that the conspiracy allegation sufficiently implied that resort to the grievance procedure had been deterred or would have been futile." (Emphasis supplied.)
>
> *Desrosiers v. American Cyanamid Co., et al.*, 299 F. Supp. 162, 166.

It is submitted that the trial court erred as a matter of law in holding that the court lacked jurisdiction over the subject matter of Count II in that exclusive jurisdiciton was

in the National Labor Relations Board. In this connection, see, also, *Local 13, etc. v. Pacific Mar. Ass'n., supra,* 441 F.2d 1061, 1068-1069.

Both the employers and the unions contended below that the second count of petitioners' complaint, which is for conspiracy among the employers and the unions to procure petitioners' wrongful discharge, is pre-empted (Employers' Br. 30-34; Unions' Br. 18-19). However, the unions concede, as they must, that in the context of a Section 301(a) suit, evidence of collusion between the employer and the union is admissible to show a breach of duty of fair representation (Unions' Br. 19). The employers did not even make this concession but stubbornly relied upon *Local 207 Int. Ass'n. of Bridge Workers v. Perko, supra,* which, as petitioners have previously pointed out, is not a Section 301 suit at all and is not, as the employers mistakenly contend, "closely analogous to the allegations" of the complaint at bar (Employers' Br. 32). For example, there is no cause of action against the employer in *Perko* for wrongful discharge.

VI

The Petitions For Removal Were Improvidently Granted.

Section 301 of the Labor Management Relations Act recognizes a suit between a union (and as interpreted by this Court in *Smith v. Evening News, supra,* by an individual employee) and an employer if employer and union are "in an industry affecting commerce." Participation by the parties in an industry affecting commerce, as defined by the

Labor Management Relations Act, is a prerequisite to federal jurisdiction over the subject matter. 29 U.S.C. § 142(1) states that "[t]he term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce."

Neither of the petitions for removal alleged that the employers and the unions were in an "industry affecting commerce" (CT-I. 1-6; CT-II. 1-4a).

As appears from the "Notice" by Frank E. Fitzsimmons (CT-II. 54-56, at 55), all the employers involved in this action were engaged in "intrastate" commerce. Since federal power to enact labor legislation is based on the interstate commerce clause of the United States Constitution, when only intrastate commerce is affected in a labor dispute, the state court has exclusive jurisdiction.

It is submitted that the trial court erred in failing to remand this cause to the Superior Court of the State of California for the County of Los Angeles as requested by the petitioners (CT-II. 88).

CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's orders (1) granting the employers' motion for summary judgment and the unions' motion to dismiss, each with prejudice, (2) granting the unions' and employers' petitions for removal, (3) denying *sub silentio* petitioners' motion for reconsideration, and (4) denying petitioners leave to amend, and each of said orders, were erroneous

and/or an abuse of discretion, and that this Court should grant certiorari and reverse the orders appealed from, and order the case remanded to the Superior Court of the State of California for the County of Los Angeles, and for petitioners' costs herein incurred.

Respectfully submitted,

DON EDGAR BURRIS

Attorney for Petitioners

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APPENDIX "A"

OPINION OF THE COURT BELOW

DO NOT PUBLISH

In the United States Court of Appeals for the Ninth Circuit.

No. 71-2755

No. 71-2846

JESS L. ELROD, et al., Appellants, vs. WESTERN CONFERENCE OF TEAMSTERS, et al., Appellees.

MEMORANDUM

[December 6, 1973]

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and RENFREW,* District Judge.

Federal removal jurisdiction was properly founded on 28 U.S.C. § 1441(a) since this action could have been brought as an original matter in the district court under section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a)) and 28 U.S.C. § 1337 (actions arising under acts of Congress regulating commerce). The gravamen of the claims against both the union and the employers is the assertion that the

*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

manner in which the union processed appellants' grievances violated the union's duty of fair representation. (*E.g., Vaca v. Sipes* (1967) 386 U.S. 171.)[1] Because the complaint, considered with the affidavits filed by the parties, revealed that there was no genuine issue as to any material fact and that no claim upon which relief could be granted was or could be stated, the district court correctly granted the defendants' motions for summary judgment and for an order of dismissal with prejudice. See Fed. R. Civ. P. 12(b), 56(b). A claim of breach of duty of fair representation cannot be sustained merely by proof that the grievance procedure terminated adversely to the union members represented.

The union and the employers agreed to a variation in the contractual grievance procedures for the processing of appellants' grievances. Such a variation in the form of the grievance procedures is not forbidden by the union's constitution. Our examination of the new procedures, none of which is in factual dispute, failed to reveal any lack of due process. Appellants' claims for reinstatement were presented to and heard by the Special Panel. Nothing in the record suggests that any appellant was denied a full and fair opportunity to present evidence that he had not picketed, if in fact he had not. The appellant who complained about the stipulations to picketing had earlier admitted his participation. We see nothing unfair about a lawyer's strategic advice to his client not to volunteer information, even if the strategy later turns out to be unsuccessful. A stipulation

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[1]Although count I of the complaint alleged a claim against the employers for breach of contract, a direct action for wrongful discharge may be maintained by an individual employee after unsuccessful prosecution of the claim in grievance procedures only if it is found that the union has breached its duty of fair representation. See *Vaca v. Sipes, supra* at 184-86.

surrendering an appeal from an arbitration award gives away nothing to which the appellants would have been otherwise entitled.

Appellants had the opportunity to present affidavits contradicting those filed by the employers and adopted by the union. They presented no affidavits that in any material respect conflicted with the affidavits of the employer.

Appellants are understandably distressed by the loss of their claims to reinstatement. They were enmeshed in labor turbulance over which they individually had very little control. Our sympathy with their plight, however, cannot be converted into agreement with them that their pleading, read with the affidavits, supported a triable claim of unfair representation.

We need not and do not reach any other issue in the case. When the claims against the union fell, the case against the employers likewise collapsed. (See note 1 *supra*.)

Affirmed.

APPENDIX "B"

CONSTITUTION OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Art. XII, Sec. 1

"(b) Contracts may be accepted by a majority vote of those members involved in negotiations and present and voting, or a majority of such members may direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive Board. When, in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership and can be rejected only by a two-thirds (2/3) vote of the members involved in the negotiations and present and voting or responding to a referendum mail ballot. If a settlement cannot be reached, the Local Union Executive Board shall order a secret ballot to be taken and it shall require a two-thirds (2/3) majority of those members of the Local Union involved in such negotiations and present and voting to adopt a motion to strike. The ballot must be 'Yes' or 'No' written on paper ballots or by approved mechanical device which assures secrecy. In the alternative, the Local Union Executive Board may conduct such strike vote by referendum mail ballot of the membership involved in such negotiations, in which event it shall also require a two-thirds (2/3) majority vote of those responding to the referendum mail ballot to authorize a strike. The failure of such membership to authorize a strike upon rejecting the employer's last offer shall require the Local Union Executive Board to accept such last

offer or such additional provisions as can be negotiated by it.

"A strike may be terminated by a majority vote of the involved members present and voting either by secret ballot or by mail referendum as directed by the Local Union Executive Board. The requirement that the employer's final offer of settlement can be rejected only by a two-thirds (2/3) vote shall not apply during a strike.

"In any case where the General President believes that an employer has made a final offer of settlement but the Local Union Executive Board has refused to submit such final offer of settlement to the involved membership, the General President is authorized to submit such final offer to the involved membership by either secret ballot vote at a meeting or by referendum mail ballot.

"The General President or the General Executive Board is authorized to direct that strike votes be taken by a referendum mail ballot or that the final offer of settlement before or during a strike shall be taken by referendum mail ballot or by secret ballot vote at a meeting.

"The General President or the General Executive Board shall have the authority to conduct, under their supervision, secret ballot votes or mail referendum balloting on such basis as they may determine in accordance with Article VI, Section 1(h), and in this regard the authority granted to the General President and the General Executive Board shall supersede any authority granted herein to the Local Executive Board and any action which may have already been taken under the direction of the Local Union Executive Board."

Art. XVI

Area, Multi-Area or National Company-wide or Industry-wide Contracts

"Section 4(a). If a majority of the affiliated Local Unions vote for area, multi-area or national, company-wide

or industry-wide negotiations for an area, national, company-wide or industry-wide contract, all involved affiliated Local Unions shall be bound by such vote, must participate in such area, multi-area or national, company-wide or industry-wide bargaining and shall be bound by the contract approved as provided below. Upon completion of negotiations by a Conference, Trade Division, or by any Committee appointed by the General President, subject to the approval of the General Executive Board, to engage in negotiations of an industry, area, multi-area or national or company-wide contract, such contract shall be submitted to the membership covered by said contract proposal for their approval or rejection.

"If a majority of the votes cast by Local Union members voting approve such contract it shall become binding and effective upon all Local Unions involved and their members. Local Unions which are parties to such contracts may not withdraw from such bargaining unit except upon six (6) months' notice and for good cause shown to the satisfaction of the appropriate Conference, Trade Division or Committee, and approved by the General Executive Board of the International Union. If any Local Union believes that an area, multi-area or national, company-wide or industry-wide contract proposal will deprive its involved members of better existing conditions of general application to all such involved members of the Local Union it may appeal to the General Executive Board which shall have the final authority to determine whether such alleged better general conditions shall be continued or shall yield to the over-all gains of the proposed contract. Unless mutually agreed to, no Local Union shall suffer any economic loss.

"(b). In the event any Conference, Trade Division or

Committee negotiates a contract which involves, affects or relates to operations of the employer or employers within the jurisdiction of other Conferences, Trade Divisions or Committees, notice of intent to execute such contract shall be given to the Conference, Trade Division, Committees or Local Unions involved in such other jurisdiction who may within ten (10) days thereafter, protest the application of such contract in their area. Failure to file such protest shall be considered a waiver of any objections to such contract, but shall not be considered an acceptance of such contract as a substitute for, or in variance of, existing agreements to which the other Conferences or Local Unions are parties.

"In the event of protest, and if the parties cannot adjust the same, the matter shall be submitted to the General Executive Board for its determination, and no such contract shall become finally effective as to such Local Unions as the General Executive Board may determine until the determination by the General Executive Board.

"All employers negotiating contracts with Multi-state, Area, Multi-Area or National Conferences, Trade Divisions or Committees established by the General President, subject to approval of the General Executive Board, or with subordinate bodies, shall be provided with a copy of this Article at the time negotiations are started so they will have notice of the approval necessary for a binding contract. All provisions of Article XVI, Section 4(a) and (b) shall be equally applicable to company-wide negotiations and contracts on an area, multi-state, multi-area or national basis.

"The General President, subject to the approval of the General Executive Board, shall have the authority to appoint negotiating committees and establish procedures for the

negotiating committees and establish procedures for the negotiation of area, multi-area or national, company-wide and industry-wide agreements and for the submission of such negotiated agreements to the membership covered by the proposed contract for approval or rejection, and to do all things necessary to implement the enforcement of such agreements and compliance by Local Unions with the provisions of this Article and the procedures established thereunder.

"Such negotiating committees shall have the authority, with the approval of the General Executive Board, to conduct contract ratification votes and strike votes on such area, multi-area or national, company-wide, industry-wide, or Local Union basis as the committee shall determine, and in the event the strike is authorized, the said committee shall have the authority, with the approval of the General Executive Board, to direct that the strike be conducted on such area, multi-area or national, company-wide, industry-wide, Local or such other selective basis as the committee shall determine; provided, however, that the results of ratification or rejection votes with respect to national agreements shall be determined on a cumulative basis of all votes cast by all affected voting members in all areas, with a cumulative majority vote necessary for acceptance, and a cumulative two-thirds (2/3) vote necessary for rejection of the final offer and strike authorization as provided in this Constitution. The requirement that the employer's final offer of settlement can be rejected only by two-thirds (2/3) vote shall not apply during a strike.

"This article shall be broadly interpreted to carry out the intent and purpose of permitting national negotiations

and national agreements in any industry in which the International Brotherhood of Teamsters has jurisdiction."

APPENDIX "C"

STATUTES INVOLVED

28 U.S.C. § 1331

"**Section 1331. Federal question –Amount in controversy–Costs.**–(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1337

"**Section 1337. Commerce and anti-trust regulations.** The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 U.S.C. § 1441.

"**Section 1441. Actions removable generally.**–
(a) Except as otherwise expressly provided by Act

of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

29 U.S.C. § 185(a) [§ 301, Labor-Management Relations Act]

"Section 185. Suits by and against labor organizations.—(a) Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

For the sake of brevity, rather than the lengthy wording of the statutes, we are setting forth the intent of California Code of Civil Procedure Sections 337(1) and 339(1), as follows:

California Code of Civil Procedure

§ 337(1)

Establishes a four-year statute of limitations for an action upon a contract in writing.

§ 339(1)

Establishes a two-year statute of limitations for an action upon a contract not in writing and for miscellaneous tort actions.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JANUARY , 1974, I served the within PETITION FOR WRIT OF CERTIORARI (JESS L. ELROD, et al. v. WESTERN CONFERENCE OF TEAMSTERS, etc., et al.) On the following named parties by depositing TWO COPIES THEREOF, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

JULIUS REICH, ESQ.
Brundage, Newhart, Miller, Ross & Reich
1625 West Olympic Boulevard
Los Angeles, California 90015

ARLO D. POE, ESQ.
639 South Spring Street
Los Angeles, California 90014

GEORGE J. TICHY, II, ESQ.
Littler, Mendelson & Fastiff
593 Market Street. Suite 900
San Francisco, California 94105

I further say that THREE COPIES of the within document were forwarded:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1974, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

Table of Authorities Cited

Cases

	Pages
General Drivers, Warehousemen & Helpers, Local No. 89 v. Riss & Co., Inc., 372 U.S. 517 (1963)	12
Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966)	12
Humphrey v. Moore, 375 U.S. 335 (1964)	12
United Steel Workers v. American Mfg. Co., 363 U.S. 564 (1960)	12
Vaca v. Sipes, 386 U.S. 171 (1967)	12

Rules

Supreme Court Rules:

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Rule 19(1)(b)	2, 3

Statutes

28 U.S.C.:

Section 1254(1)	2, 3, 9
Section 1441(a)	8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1078

JESS L. ELROD, et al., *Petitioners*

vs.

WESTERN CONFERENCE OF TEAMSTERS, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYER RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, and is reprinted in Appendix "A" to the Petition at pages 1-3.

JURISDICTION

The Memorandum Opinion of the Court of Appeals was issued on December 6, 1973. The Petition for a Writ of Certiorari was filed on January 8, 1974. Petitioners invoke the jurisdiction of this Court pur-

suant to 28 U.S.C. §1254(1). It is the position of the Employer respondents[1] that this Court is without jurisdiction to review this case on writ of certiorari because only cases "in the courts of appeals" may be so reviewed pursuant to 28 U.S.C. §1254(1). The Petition here does not challenge any order or judgment of the Court of Appeals (see "Questions Presented." Petition pp. 3-7). Rather, it attacks allegedly erroneous rulings of the district court (see Appendix to Petition pp. 1-3). In essence, petitioners are seeking review by certiorari of the judgment of the district court. Such review exceeds the jurisdictional grant set forth in 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should this Court grant review of rulings by the district court on matters not reached by the Court of Appeals?

2. In light of the bases for review on certiorari articulated in Rule 19 of the Supreme Court Rules, should this Court grant review here?

STATUTE AND RULE INVOLVED

The relevant authorities involved herein are 28 U.S.C. §1254(1) and Rule 19(1)(b) of the Supreme

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[1]California Trucking Association
Trucking Employers, Inc.
Mason Mercantile Co., d/b/a Metropolitan Terminals
Piggy Back Shippers
California Shippers Association

Court Rules. Rule 19(1)(b) of the Supreme Court Rules provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * *
>
> "(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Title 28, Section 1254(1) of the United States Code provides that:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

STATEMENT OF THE CASE

A. The Strike

Petitioners were employed prior to April 8, 1970, by respondent Mason Mercantile Co., dba Metropolitan Terminals (hereinafter referred to as "Metropolitan"), at its terminal facilities in the City of Commerce, California (CR I 332, 29, 32, 34, 35, 37, 39, 44, 48, 50)[2] and were members of and represented for purposes of collective bargaining by Teamsters Local 357 (hereinafter called "Local 357")[3].

On or about April 1, 1970, an illegal strike affecting the entire trucking industry occurred in the Los Angeles area (CR I 52-53), and on April 5, 1970, pickets appeared at Metropolitan's terminal (CR I 29, 32, 34, 35, 44, 47, 48, 50, 52, 54, 56, 57). When the picketing commenced, certain employees, including petitioners, did not report for work (CR I 29-30, 32, 34, 35, 37, 39, 44-45, 50). Metropolitan gave employees who failed to report 24 hours to do so or be fired (CR I 29-30, 32, 39, 45), and on April 7, 1970, Metropolitan discharged all employees who failed to report for work, including all petitioners herein (CR I 30-32, 34, 35, 37, 39, 45, 47, 49, 54, 75).

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[2]The symbols "CR I" and "CR II" refer to Volumes I and II, respectively, of the record in the Court of Appeals. The symbol "RT" refers to the Reporter's Transcript of the proceedings in the district court.

[3]The terms and conditions of petitioners' employment were governed by certain memorandum agreements between Local 357 and Metropolitan binding the parties to the terms of the National Master Freight Agreement (a labor contract negotiated on a nationwide basis by the Teamsters National Freight Industry Negotiating Committee and respondent Trucking Employers, Inc.) and to the terms of the Western States Area Pickup and Delivery Local Cartage and Dock Workers Supplemental Agreement (CR I 77-78, 81-313, 332-33).

All discharged Metropolitan employees subsequently filed grievances with Local 357 protesting their discharge (CR I 36, 38). With their Union's cooperation, they also filed applications for rehire with Metropolitan (CR I 30, 32, 34, 41, 47). Five discharged employees were taken back by Metropolitan as new hires (CR I 31).

B. The "Special Panel"

In June, 1970, respondents Trucking Employers, Inc., and California Trucking Association, on behalf of member-carriers and other employers, including Metropolitan, executed a Stipulation and Agreement (hereinafter called "the Special Panel Agreement") with the National Freight Industry Negotiating Committee, International Brotherhood of Teamsters, Western Conference of Teamsters and Joint Council of Teamsters No. 42 (CR I 21-23). This Special Panel Agreement established a procedure to deal with the multitude of grievances arising out of the trucking industry strike in Los Angeles during April, 1970. The Special Panel Agreement provided that grievances arising from the work stoppage were to be turned over to a Special Panel composed of three Teamsters representatives and three California Trucking Association ("CTA") members. The Special Panel was to hear and decide the following issues:

(1) the status of discharged employees; and

(2) the seniority of employees discharged as a result of the strike and subsequently reemployed, or who might in the future be reemployed.

All parties appearing before the Special Panel were to be permitted to present evidence and argument in support of their respective positions. A majority vote of the Special Panel was to be final and binding on all parties. If the Special Panel deadlocked, the case was to go to an impartial arbitrator[4].

Pursuant to notice, all petitioners appeared before the Special Panel on July 27 and 28, 1970, and presented evidence and argument in support of their position (CR I 30-31, 32-33, 34, 36, 38, 41-42, 46, 47, 50-51, 75). Petitioners read their grievances and had an opportunity to explain why they stayed away from work during the strike (CR I 33-36, 38, 42, 46). Most of the petitioners admitted having actually participated in the strike (CR I 30, 32-33, 36, 38, 46). Union representatives from Local 357 were also present at the hearings and acted as counsel to petitioners (CR I 36, 41-42, 46, 75). Petitioners and the Local 357 representatives had full opportunity to present witnesses, elicit testimony, make objections and motions, and otherwise to present their position (CR I 75). Metropolitan's representatives likewise were given an opportunity to present their position (CR I 76).

In August, 1970, the Special Panel issued a decision denying petitioners reinstatement (CR I 31, 34, 36, 79-80, 337). However, seven other dis-

[4]The Special Panel Agreement also provided that counsel for the Teamsters and counsel for the CTA could mutually agree to alter or amend the language of the Agreement without procuring new signatures. Despite the inclusion of such provisions, the attorneys did not alter or amend the language of the Agreement.

charged Metropolitan employees who failed to report for work during the strike were reinstated.

C. The Proceedings Before the District Court

On February 25, 1971, petitioners filed a complaint for injunctive relief against respondents in the Superior Court of the State of California for the County of Los Angeles, attacking their discharges and the Union respondents' representation of them before the Special Panel. Respondents removed the case to the district court for the Central District of California, and immediately thereafter the Union respondents moved for dismissal and the Employer respondents moved for dismissal and/or summary judgment.

In granting the Employer respondents' motion, the district court found that petitioners had submitted the issue of their employment status to the Special Panel created by the Union and Employer respondents and that the petitioners' claims were barred by the decision of the Special Panel and by the statute of limitations. The district court further found that petitioners' declarations on file with the court showed that the Unions had not acted arbitrarily, discriminatorily or in bad faith in representing petitioners before the Special Panel, and that therefore no breach of the Union's duty of fair representation such as would allow the petitioners to maintain action against the Employers for unlawful discharge was shown.

D. The Decision of the Court of Appeals

Petitioners' appeal from the district court's ruling raised issues in addition to those presented to the district court, including the questions of whether the lower court properly asserted jurisdiction over the case and whether the Special Panel was properly constituted as an arbitral body with power to make final and binding decisions. The Court of Appeals unanimously concluded that federal removal jurisdiction was properly founded on 28 U.S.C. §1441(a) and affirmed the district court's order granting respondents' motions for summary judgment and dismissal with prejudice. The Ninth Circuit concluded that petitioners' affidavits did not conflict in any material respect with the affidavits filed by respondents showing no breach of the Union respondents' duty of fair representation. Accordingly, the Court of Appeals did not find it necessary to decide any other issue raised on appeal.

In reaching its conclusion, the Court of Appeals reasoned that the affidavits of the parties showed that (Appendix to the Petition pp. 2-3):

> "The union and the employers agreed to a variation in the contractual grievance procedures for the processing of [petitioners'] grievances. Such a variation in the form of the grievance procedures is not forbidden by the union's constitution. Our examination of the new procedures, none of which is in factual dispute, failed to reveal any lack of due process. [Petitioners'] claims for reinstatement were presented to and heard by the Special Panel. Nothing in the

record suggests that any [petitioner] was denied a full and fair opportunity to present evidence that he had not picketed, if in fact he had not. The [petitioner] who complained about the stipulations to picketing had earlier admitted his participation. We see nothing unfair about a lawyer's strategic advice to his client not to volunteer information, even if the strategy later turns out to be unsuccessful. A stipulation surrendering an appeal from an arbitration award gives away nothing to which the [petitioners] would have been otherwise entitled."

ARGUMENT

I

THE PETITION IMPROPERLY SEEKS REVIEW OF RULINGS OF THE DISTRICT COURT NOT CONSIDERED BY THE COURT OF APPEALS.

Rule 19 of the Rules of the Supreme Court provides for review of the decisions of the courts of appeals by writ of certiorari. This provision is in accordance with the jurisdictional grant of 28 U.S.C. §1254(1).

In the instant case questions II, III, IV, V and VI raised in the Petition (Petition pp. 3-7) concern matters decided by the district court which were not reached by the Court of Appeals. Petitioners are seeking a redetermination in this Court of the rulings of the district court. Rule 19 makes no provision for review of the decisions of the district courts on writ of certiorari, and the language of 28 U.S.C. §1254(1),

allowing review on certiorari of cases "in the courts of appeal" suggests that questions not considered by the Court of Appeals cannot be reviewed by this Court. Accordingly, the writ should be denied here.

Moreover, question I raised in the Petition challenges only the district court's order of a summary judgment and dismissal with prejudice. It does not challenge the judgment of the Court of Appeals affirming the district court's order. Therefore, review of that question on certiorari is likewise improper, and should be denied.

II

THE PETITION FAILS TO PRESENT ANY BASIS FOR REVIEW BY THIS COURT

Rule 19 of the Rules of the Supreme Court of the United States establishes the principle that review by this Court is warranted only where there are special and important reasons therefor. Even if question I of the Petition properly challenged the judgment of the Court of Appeals affirming the district court's order of summary judgment, certiorari could not be granted unless the petitioners showed special and important reasons why this Court should review the decision of the Court of Appeals.

Petitioners have simply failed to sustain this burden. Although Petitioners argue that the district court abused its discretion, they do not show that the issue is reviewable by this Court. Thus, petitioners do not contend that the decision of the Court of Appeals

affirming the order of summary judgment and dismissal with prejudice is in conflict with the decision of any other court of appeals on the same matter. In fact, petitioners do not cite a single case in support of their attack on the order. Nor does the Petition argue that an important unsettled question of federal law is involved, or that the Court of Appeals decision is in conflict with applicable decisions of this Court.

Finally, the Petition neither argues nor shows that the lower court "departed from the accepted and normal course of judicial proceedings" or sanctioned such a departure by any other court or tribunal, to a degree calling for the exercise of this Court's power of supervision. Indeed, the Court of Appeals carefully scrutinized the record herein covering the grievance-procedures whereby petitioners' claims were initially heard by the Special Panel. The Court of Appeals found that those procedures "failed to reveal any lack of due process" (Appendix to the Petition p. 2.)

III

THE RECORD HEREIN FULLY SUPPORTS THE DECISION OF THE COURT OF APPEALS

Even if the merits of this case had been properly framed for this Court's review, this would not be a case involving any departure from the Unions' duty of fair representation. Respondents' decision to process petitioners' grievances through the Special Panel was neither illegal nor unfair. Federal labor law clearly favors employer-union arrangements designed

to meet special circumstances and encourage industrial peace. *Humphrey v. Moore,* 375 U.S. 335 (1964); *United Steel Workers v. American Mfg. Co.,* 363 U.S. 564, 566 (1960); *Vaca v. Sipes,* 386 U.S. 171, 191 (1967); *Haynes v. United States Pipe & Foundry Co.,* 362 F.2d 414, 416-418 (5th Cir. 1966). The Special Panel which was created in the instant case was a joint labor-management committee consisting of an equal number of members appointed by the International Brotherhood of Teamsters and by the California Trucking Association. As such, the Special Panel constituted an arbitral body whose decisions must be given full play by the courts. *Humphrey v. Moore, supra; General Drivers, Warehousemen & Helpers, Local No. 89 v. Riss & Co., Inc.,* 372 U.S. 517 (1963).

Only when an employee is able to present evidence of bad faith in the conduct of the grievance proceedings can he attack and overturn a final and binding grievance committee award in court. *Vaca v. Sipes, supra.* In *Vaca v. Sipes,* this Court ruled than an employee cannot upset a grievance committee decision merely by introducing contrary evidence. He must show that he was represented "arbitrarily, discriminatorily, or in bad faith". *Vaca v. Sipes, supra,* 386 U.S. at 189, 191.

The facts in the record in this case cannot support an inference of bad faith in the handling of the petitioners' grievances. Nor do the facts support petitioners' claims of unfairness and bias by the Special Panel. As the affidavits submitted by the Employer respondents clearly show, petitioners and their Union repre-

sentatives appeared at the Special Panel hearings and were given full opportunity to present witnesses, elicit testimony, make objections and motions, and otherwise present their positions. The declarations of petitioners and their employees originally discharged by Metropolitan on file herein (CR I 30, *et seq.*) show that petitioners were given a fair hearing and that evidence was adduced to support the Special Panel decisions. The declarations show that during the hearings Special Panel members specifically asked the grievants whether they had picketed, engaged in violence, or threatened anyone. Most of the petitioners admitted to the Special Panel (CR I 30, *et seq.*) that they had picketed and, in some cases, challenged trucks during the strike. Furthermore, petitioners admitted that they were given an opportunity to read their grievances and to explain their conduct to the Special Panel (CR I 30, *et seq.*). Of the individuals who submitted grievances regarding their employment status with Metropolitan, a total of seven employees were reinstated by the Special Panel (CR I 21-36, 46-47). Surely this is strong evidence that the Special Panel listened to the grievants' exculpatory statements and weighed their veracity. Under such circumstances, there can be no basis for an inference of unfairness or bad faith in the handling of the grievance process.

CONCLUSION

As the foregoing analysis demonstrates, there is no basis for review by this Court. The Employer respondents respectfully submit, therefore, that the Petition should be denied.

Dated: February 5, 1974.

Respectfully submitted,

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